No. 78-1324

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIE JAMES JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the district court erred in failing to require the government to disclose the identity of a government informant whose identity petitioner already knew. Petitioner also contends that he did not receive effective assistance of counsel in the court of appeals.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a two-count indictment charging possession with intent to distribute, and distribution, of approximately 140 grams of phencyclidine (PCP), a schedule III controlled substance, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of three years' imprisonment with a special parole term of two years. The court of appeals affirmed by judgment order (Pet. App. 8-b to 10-b).

As summarized in the opinion of the court of appeals (Pet. App. 8-b to 9-b), the evidence showed that on October 13, 1975, undercover Drug Enforcement Agent James Stepp was introduced to petitioner by an unidentified government informer, who had no further part in the transaction. Agent Stepp brought sufficient funds with him to that meeting to purchase 5,000 units of PCP (I Tr. 20-24).[1] Petitioner, who told Stepp that he frequently dealt in such quantities, had a 5,000 unit package of PCP on hand, which he sold to the agent (I Tr. 21-22). Petitioner was arrested several months later.

Both prior to and during the trial, petitioner requested an order directing the government to stipulate that the informant's true identity was Robert Payne (I Tr. 10-14). The government refused to concede that Robert Payne was in fact the informant and requested the district court to hold a hearing *in camera* to determine whether disclosure would be required (I Tr. 71-73).[2] After the hearing, it was determined that petitioner knew the informant by name (II Tr. 65), had no intention of calling him as a witness, had failed to secure Payne's presence by subpoena (II Tr. 58), and had requested disclosure of the informant's name only for the purpose of obtaining a jury instruction that unfavorable inferences of entrapment should be drawn from the failure of the

[1]"Tr." designates the trial transcript. "Supp. Tr." designates the transcript of the *in camera* hearing.

[2]At the hearing it was determined that there was a substantial risk of death to the informant if his identity was officially disclosed on the record (Supp. Tr. 4-6).

government to produce the informant (I Tr. 83-93; II Tr. 126-130).[3] As the court noted in refusing to order disclosure, the defendant claimed already to know the informant's identity, and he thus appeared to be equally accessible as a witness to both sides (I Tr. 92-93; II Tr. 75). Since petitioner had shown such slight need for the informant's name, and since the government opposed formal disclosure of his identity on the grounds that future prosecutions (as well as the safety of the informant) would be jeopardized, the district court ruled (II Tr. 74-76) that disclosure was not compelled under this Court's decision in *Roviaro* v. *United States*, 353 U.S. 53 (1953).

2. Since petitioner claimed to know the informant's identity and nonetheless refused to call him as a witness, the court of appeals correctly concluded (Pet. App. 10-b) that any error in applying *Roviaro* in this case—and we submit there was no error—was harmless beyond a reasonable doubt. The requested public naming of the informant by the prosecution in this case was irrelevant to the defendant's ability to present his defense by calling and examining the informant as a witness.[4] The defendant offered no evidence of any kind to support any claim of entrapment or prosecutorial misconduct. Where, as here, the defendant claims to know the identity of the informant and it is not shown that the informant's appearance at trial is in any way material to the defense,

[3]Defense counsel conceded at trial that no evidence of entrapment existed, but stated it was his intention nevertheless to "go to the jury with every inference raised from his absence and closeness to this defendant * * *" (I Tr. 91). Counsel also stated that he wished to cross-examine Agent Stepp by confronting him with the theory of entrapment (II Tr. 44-45).

[4]The government located Robert Payne's address for the defense and the court offered a continuance, but the defense still refused to subpoena him as a witness (II Tr. 56-59).

no showing of prejudice to the defense is made, and reversal of a conviction is inappropriate. *United States* v. *Gonzalez*, 555 F. 2d 308, 314 (2d Cir. 1977). Cf. *United States* v. *Brown*, 562 F. 2d 1144, 1151 (9th Cir. 1977).

In any event, the refusal to disclose the informant's identity in this case was entirely proper. In *Roviaro*, the Court held that whether an informant's identity must be disclosed turns on a balancing of the needs of law enforcement and the individual's interest in a fair trial. 353 U.S. at 62. The Court noted that this balancing necessarily must be resolved on the particular facts of each case. *Ibid.* In this case, the facts showed that premature disclosure of the informant's identity would seriously threaten both the informant's survival and the government's success in subsequent prosecutions and would provide no material benefit to the defendant. The district court thus correctly ruled that the balance of interests supported the government's refusal to disclose the informant's identity. See *United States* v. *Anderson*, 509 F. 2d 724, 729-730 (9th Cir. 1974), cert. denied, 420 U.S. 910 (1975); *United States* v. *Brown*, *supra*, 562 F. 2d at 1148-1149.[5]

3. Petitioner further contends that he was deprived of the effective assistance of counsel on his appeal because, *inter alia*, counsel did not argue that "the informant's privilege ceases to exist when the petitioner knows the identity of the informant" (Pet. 18). It

[5]See also *United States* v. *Alonzo*, 571 F. 2d 1384, 1387 (5th Cir. 1978) (informant only viewed transaction and did not participate; disclosure not required); *United States* v. *Estrella*, 567 F. 2d 1151, 1152-1153 (1st Cir. 1977) (informant arranged and witnessed transaction between accomplice and agent but never dealt directly with defendant; disclosure not required); *United States* v. *McManus*, 560 F. 2d 747, 749, 751 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978) (informant introduced agent to defendant's middleman but was not direct participant in drug transaction; disclosure not required).

should be noted initially that petitioner's premise lacks any factual foundation, because the government had never conceded that Robert Payne was in fact the informant. But even if he were, petitioner's argument is without merit because the purpose of nondisclosure here was not to conceal the informant's identity from petitioner, but from participants at subsequent trials. See *Roviaro* v. *United States*, *supra*, 353 U.S. at 58 n.5, 59. In any event, it has never been held that counsel is ineffective merely because all subtle variations of the defendant's legal position have not been aired in prior proceedings. Indeed, if this were the standard of ineffective counsel, it is questionable whether orderly judicial procedure could be maintained. For example, the rule that an objection is waived if not timely raised at trial (and other similar issue-foreclosure rules) would be placed in doubt.

Petitioner's remaining contentions relate to the form of the appellate brief. While the 78-page brief filed by petitioner's counsel may have been inartfully drawn, it nonetheless incorporated substantially all of the relevant proceedings at trial and served to acquaint the appellate court with the defense's positions on the legal issues in the case. The brief also made reference to the major cases relevant to those issues. In these circumstances, it cannot be said that the defendant lacked an "active advocate" (*Anders* v. *California*, 386 U.S. 738, 744 (1967)) or was unconstitutionally deprived of the effective assistance of counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

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